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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN FELIPE ARREOLA ALVARADO, Defendant and Appellant.	2d Crim. No. B252590 (Super. Ct. No. 2012023694) (Ventura County)

Juan Felipe Arreola Alvarado appeals a judgment following conviction of three counts of committing a lewd act upon a child, with findings that he committed lewd acts upon more than one child and engaged in substantial sexual conduct with a child under the age of 11 years. (Pen. Code, §§ 288, subd. (a), 667.61, subd. (e)(4), 1203.066, subd. (a)(8).)[1] We affirm.

FACTUAL AND PROCEDURAL HISTORY

At trial, the prosecution presented evidence that Alvarado committed a lewd act upon nine-year-old Sophia T. on February 13, 2011 (count 1). The prosecution also presented evidence that Alvarado committed lewd acts upon his niece Y.A. in 1988 and 1989 (counts 2 & 3). Over defense objection, the trial court also permitted evidence of Alvarado's uncharged lewd acts committed against his niece P.A. when she was a child.

[1] All further statutory references are to the Penal Code unless stated otherwise.

Lewd Act upon Sophia T.

On February 13, 2011, Sophia T.'s family held a birthday party for her and her father at the family's Oxnard home. Alvarado, a family friend, arrived at the party "already drunk," "six to eight beers into it." When Sophia and her mother greeted Alvarado outside, he picked up Sophia and carried her aside. Sophia's mother directed Sophia to return inside and suggested that Alvarado join the party in the backyard.

Sophia later saw Alvarado inside the home. He gave her $20 and a note with his phone number. Sophia discarded the note and played in her bedroom with her friend Natalie. Alvarado stood in the hallway and called for Sophia. When she left her bedroom, he kissed her with his closed mouth and advised her not to tell anyone. Sophia felt afraid and returned to her bedroom.

Alvarado called Sophia into the hallway again. This time, he kissed her with his open mouth for five to ten seconds and directed her not to tell anyone. Sophia believed the kiss lasted a long time and was similar to kissing in the movies. When Sophia returned to her bedroom, Natalie urged her to inform her mother.

Sophia was upset and crying as she complained to her mother. Sophia also retrieved Alvarado's note for her mother who recognized Alvarado's phone number.

Sophia's mother then confronted Alvarado who "was nervous . . . looking down, looking ashamed." Alvarado responded that Sophia's accusation was true. Several days later, Sophia's parents reported the lewd acts to police officers. During a recorded interview, Oxnard Police Detective Erica Escalante interviewed Sophia. The prosecutor played the videotaped recording at trial.

Lewd Acts Upon Y.A.

On July 5, 2011, Y.A. contacted Detective Escalante and informed her that Alvarado had molested her and her cousin P.A. when they were children.

At trial, Y.A. testified that Alvarado touched her vagina beneath her clothing and moved her hand over his penis many times during the years that he lived with her family. The molestations began in 1983 or 1984, when Y. was five and one-half

years old, and continued until she was 11 years old. She testified that the molestations continued "for years" and during "[t]he whole time [Alvarado] lived with [her family]."

Y.A. also testified that Alvarado kissed her and touched her vagina on more than one occasion when she was five years old, when she visited her grandmother in Mexico.

Lewd Acts Upon P.A.

P.A. testified that Alvarado began molesting her in 1985 when she was eight years old. She described incidents where Alvarado touched her breasts and vagina over her clothing and asked her to touch his penis. P. described an incident that occurred when she was 12 years old and Alvarado rubbed her breasts and vagina over her nightgown. On several occasions, he asked if he could penetrate her vagina with his penis. Many years later, P. informed her mother of the molestations.

Conviction and Sentencing

The jury convicted Alvarado of three counts of committing a lewd act upon a child and found that he committed lewd acts upon more than one child and engaged in substantial sexual conduct with a child under the age of 11 years. (§§ 288, subd. (a), 667.61, subd. (e)(4), 1203.066, subd. (a)(8).) The trial court sentenced Alvarado to an indeterminate term of 25 years to life (count 1), and a consecutive five-year determinate term (counts 2 & 3). The court imposed a $5,000 restitution fine, a $5,000 parole revocation restitution fine (stayed), and a $1,300 sex offender fine. (§§ 1202.4, subd. (b), 1202.45, 290.3.) The court also ordered victim restitution and awarded Alvarado 96 days of presentence custody credit.

Alvarado appeals and contends that the trial court erred by: 1) denying a pinpoint instruction regarding voluntary intoxication and the crime against Sophia T., and 2) admitting evidence of his prior uncharged sexual crimes against Y.A. and P.A.

DISCUSSION

I.

Alvarado argues that the trial court erred by refusing to instruct with CALCRIM No. 3426 concerning voluntary intoxication and specific intent. He points to evidence that he was drunk when he arrived at the party, he had been driven to the party by others because he could not drive, and he continued to consume alcohol thereafter. Alvarado asserts that the error denied his federal constitutional rights to a fair trial and to due process of law, including his constitutional right to present a defense. He claims the error is reversible pursuant to any standard of review.

An instruction regarding voluntary intoxication is a pinpoint instruction that defendant must request. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) The trial court may properly refuse a voluntary intoxication instruction if there is no substantial evidence of the defendant's voluntary intoxication and its effect on his formation of specific intent. (*Ibid.* [statement of general rule]; *People v. Roldan* (2005) 35 Cal.4th 646, 715 [defendant is not entitled to an instruction regarding a theory for which there is no supporting evidence], overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The evidence of intoxication and its effect on defendant must be more than "minimal." (*Roldan*, at p. 716.) "[A]n intoxication instruction is not required when the evidence shows that a defendant ingested drugs or was drinking, unless the evidence *also* shows he became intoxicated to the point he failed to form the requisite intent or attain the requisite mental state." (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661.)

The trial court properly denied the request for a voluntary intoxication instruction because evidence of Alvarado's intoxication was minimal. Sophia's father's testimony that Alvarado was "already drunk" when he arrived at the party and that "somebody drove [Alvarado] to the party because he couldn't drive any longer" was insubstantial and does not require a voluntary intoxication instruction. This is true because Sophia's father did not see Alvarado arrive at the birthday party, and Sophia's

mother did not think Alvarado was intoxicated. Moreover, no witness testified that Alvarado's drinking noticeably affected or impaired his mental state or actions.

As a general rule, application of the ordinary rules of evidence does not impermissibly infringe upon a defendant's right to present a defense. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1019.) For a defendant's constitutional rights to override application of the ordinary rules of evidence, the proffered evidence must possess more than slight relevancy. (*Ibid.*) Evidence of intoxication bereft of evidence of the effect of the intoxication on the defendant's specific intent, possesses no relevance and is properly excluded. (*Ibid.* [trial court has no discretion to admit irrelevant evidence].)

II.

Alvarado contends that the trial court erred by admitting evidence of his uncharged sexual offenses against Y.A. and P.A. pursuant to Evidence Code sections 1101, 1108, and 352.[2] He asserts that evidence of the uncharged offenses was remote in time, dissimilar to the charged offenses, and more prejudicial than probative. Alvarado argues that the error violated his constitutional right to a fair trial and to due process of law.

In exercising its discretion to admit evidence of a prior sexual offense pursuant to sections 1108 and 352, the trial court must consider such factors as the nature, relevance, and possible remoteness of the prior offense; the degree of certainty of its commission; the likelihood of confusing, misleading, or distracting jurors from their main inquiry; similarity to the charged offenses; any likely prejudicial effect upon the jurors; the burden on defendant to defend against the prior offense; and the availability of less prejudicial alternatives to its outright admission, such as defendant admitting that he committed the prior offense or the exclusion of irrelevant, inflammatory details regarding the prior offense. (*People v. Loy* (2011) 52 Cal.4th 46, 61.) Our Legislature has determined that prior sexual offense evidence is particularly probative, and there is a

[2] Further statutory references are to the Evidence Code unless stated otherwise.

presumption in favor of its admission. (*Id.* at pp. 61-62.) We review the court's ruling pursuant to sections 352 and 1108 for an abuse of discretion. (*Id.* at p. 61.)

The trial court did not abuse its discretion in permitting evidence of the uncharged sexual offenses against Y.A. and P.A. because the evidence was relevant to the credibility of the complaints of Sophia T. and Y.A. that Alvarado molested them. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 [section 1108 intended "to relax the evidentiary restraints" of section 1101, subdivision (a) to allow factfinder to evaluate the credibility of the victim and the defendant].) Section 1108 permits the factfinder to consider evidence of prior offenses for any relevant purpose, subject to the weighing process of section 352. (*People v. Loy, supra,* 52 Cal.4th 46, 63.)

Moreover, the charged and uncharged sexual offenses are similar because they concern the commission of lewd acts upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a); § 1108, subd. (d).) Alvarado's acts involve the kissing and sexual touching of children who were 12 years old and younger. "It is enough the charged and uncharged offenses are sex offenses as defined in section 1108 [subdivision (d)]." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)

The remoteness of the uncharged acts does not preclude evidence of their commission. Decisions have countenanced the admission of prior sex offenses that were similarly remote in time. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12-year gap], superseded by statute by *People v. Robertson* (2012) 208 Cal.App.4th 965, 991; *People v. Branch* (2001) 91 Cal.App.4th 274, 285 [30-year gap "balance[ed] out" by substantial similarities between the prior and the charged offense].)

Finally, evidence of the uncharged acts was no more inflammatory than evidence of the charged acts against Y.A. The trial court also instructed that evidence of the uncharged offenses was not sufficient by itself to prove Alvarado's guilt and that the prosecutor bore the burden of proving every element of the offense beyond a reasonable doubt. We presume the jury understands and follows the court's instructions. (*People v. Adams* (2014) 60 Cal.4th 541, 578.) The trial court did not abuse its discretion in its

ruling pursuant to section 352. (*People v. Merriman* (2014) 60 Cal.4th 1, 58 ["A court has broad discretion to exclude, as substantially more prejudicial than probative, sexual offense evidence that meets the requirements for admission under Evidence Code section 1108, and its ruling in this regard is reviewed for abuse of discretion"].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Matthew Guasco, Judge

Superior Court County of Ventura

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